No. 85-781

IN THE

Supreme Court of the United States

October Term, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE,
Petitioners,

v.

MICHAEL D. BARNES, ET AL.,
Respondents.

On Petition For a Writ of Certiorari
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SENATOR JOHN MELCHER AND REPRESENTATIVES MIKE SYNAR AND CHARLES E. SCHUMER

David C. Vladeck
(*Counsel of Record*)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae* Senator John Melcher and Representatives Mike Synar and Charles E. Schumer

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This brief is filed on behalf of three members of Congress—Senator John Melcher and Representatives Mike Synar and Charles E. Schumer—who are concerned about the argument in petitioners' briefs, and in Judge Bork's dissenting opinion in the court of appeals, that individual members of Congress have no standing to challenge the President's attempted pocket veto of H.R. 4042.[1] *Amici*'s concern is heightened by the fact that petitioners' brief appears to be a broad-scale attack on the standing of individual legislators to bring any suit to

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[1] This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk of the Court.

challenge the action of other governmental officials or bodies as an unlawful infringement on the official power of a Senator or Representative. If accepted, petitioners' theory would close the courthouse door to members of Congress.

In *amici*'s view, there is no reason for the Court to discuss, let alone decide, the issue of the standing of individual congressmen. First, as respondents and Judge Bork recognized, at least in this case, the standing of the Senate and the leadership of the House, on the one hand, and of individual members, on the other, are identical. All of the respondents have alleged precisely the same harm—*i.e.*, that the President's purported pocket veto has resulted in the Executive's failing to publish, preserve, and implement H.R. 4202, thereby depriving both Houses of Congress of their constitutional roles in the enactment of H.R. 4202, and, at the same time, nullifying the votes of the individual legislators who supported that bill. Accordingly, since the standing of individual legislators is based on the same theory asserted by the Senate and by the House leadership, acting collectively on behalf of the individual members, there is no reason for the Court to consider their standing separately.

Second, this case is an inappropriate vehicle for a full-scale exploration of the law of the standing of members of Congress because the standing claims asserted here are very different from those raised in many of the other contexts in which the issue has been presented. For over a decade, individual legislators have brought suits in a wide range of areas distinct from the purely law-making context at issue here. These include suits to protect the rights of individual legislators to participate fully in the legislative process, to safeguard the participation of the Senate in the appointment of Officers of the United States and in the ratification of Treaties, to preserve the House's role in originating legislation to raise revenues, and, most recently, to challenge the statutory budget reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985 (known as the Gramm-Rudman-Hollings Act).

In each of these areas, the question of the standing of individual legislators has turned on the nature of the process in-

volved (such as providing the President with advice and consent in the appointment of Officers of the United States) and the extent to which the legislator has been deprived of a right conferred by the Constitution to participate in that process. And in each of these areas, the lower courts have been sensitive to the separation of powers concerns which form the cornerstone of petitioners' standing attack, but have often dealt with those concerns through application of related justiciability doctrines, such as ripeness, political question, and equitable discretion. *Amici* submit that, given the markedly different questions raised in each of these contexts, and the fact that there is no need for the Court to consider the standing of individual legislators in this case, the Court should reject petitioners' suggestion that the Court engage in a wholesale review of the standing of members of Congress.

I. *The Senate And The House Have Standing.*

This action was initially brought by thirty-three members of the House of Representatives. In the district court, the United States Senate and the Bipartisan Leadership Group of the House of Representatives, composed of ranking leaders from both parties, were granted leave to intervene. In *amici*'s view, there can be no doubt that the institutional respondents—the Senate and the leadership of the House—have standing to maintain this action. The President's purported pocket veto of H.R. 4204 caused direct and tangible harm to the participation of both Houses in the lawmaking process, since Article I vests the lawmaking power in these bodies. Therefore, if there is an improper exercise of the pocket veto power by the President, it directly infringes on Congress' constitutional right to enact legislation. As a result, the institutional respondents have plainly suffered an injury to the lawmaking powers that they have been assigned by the Constitution, and that injury is more than sufficient to confer standing. *See Goldwater v. Carter,* 444 U.S. 996, 998-1002 (1979)(Powell, J., concurring). *Cf. Coleman v. Miller*, 307 U.S. 433 (1939). Because this argument will be fully developed in the briefs of the respondents, *amici* will not restate it here. However, there are three observations *amici* wish to make regarding petitioners' standing argument.

First, contrary to the argument that runs throughout petitioners' brief, the injury suffered by respondents here is not the same as in those cases in which a President simply refuses to carry out a law which everyone agrees has been validly enacted. In such a case, Congress, at least in theory, can resort to the power of impeachment to remedy its grievances. But that alternative cannot be relied on here, where, even if respondents believe that the President is violating the Constitution, they have no basis for questioning his good faith in exercising the pocket veto. Thus, the injury here is distinctly one suffered by the two Houses which voted for H.R. 4202, and they have a right to go to court to vindicate their injury and to prevent its recurrence. Indeed, as a practical matter, Congress has no alternative.

Second, the separation of powers concerns raised by petitioners are largely illusory. While the lower courts have often determined that members of Congress have standing to bring an action, the courts have almost as frequently found the legislator's claims to be non-justiciable for other reasons, or have invoked the doctrine of equitable discretion to avoid consideration of the merits. *See, e.g., Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1982); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). Thus, while there have been a number of cases brought by members of Congress that have overcome the standing hurdle, there have been only a handful of decisions on the merits. Therefore, while reaching to decide the congressional standing issue raised by petitioners may unnecessarily foreclose legitimate lawsuits by lawmakers, refraining from deciding the issue will by no means threaten the balance of power among the branches of government.

Lastly, stripped of its rhetoric, petitioners' argument seeks to convert what are, in essence, concerns over respect for the separation of powers principles embodied in the Constitution into a standing argument. Dismissal of this action is warranted, petitioners claim, in order to preserve the equilibrium among the branches established by the Constitution, and to ensure that

political give and take—not judicial rule—is the sole tool for resolving inter-branch disputes. In so arguing, it is petitioners, not respondents, who seek a change in the law of justiciability. This Court, over 180 years ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), made it clear that cases such as this—direct constitutional challenges to Executive action—were justiciable. And nearly twenty-five years ago, in *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court laid down the standards to guide it in determining whether a particular political question was fit for judicial resolution.

Petitioners' standing argument, if accepted, fundamentally undermines *Marbury* and *Baker*, and jeopardizes the ability of government to function in accordance with the Constitution. In no case cited by petitioners or the dissent below did courts intervene and issue a ruling until the governmental parties had reached an impasse that did not appear to be amenable to political resolution, as this case illustrates. Unless the courts remain open to review respondents' claim, serious allegations of unconstitutional action by the Executive would go unreviewed. The refusal of the courts to even consider a charge that the President has disregarded his constitutional duty to preserve, publish, and implement a law is hardly a trivial matter. At the very least, it raises questions about the viability of the lawmaking system spelled out in the Constitution and invokes the specter of the federal government brought to a halt by the intransigence of the President with regard to his duty under Article II to see that the laws are faithfully executed. Thus, to adopt the standing theory of the petitioners, this Court would have to retreat from its long-established view that interpretation of the Constitution does not imply a lack of respect for a coordinate branch; rather, "[i]t is, emphatically, the province and the duty of the judicial branch to say what the law is." *Marbury, supra* at 176. *See United States v. Nixon*, 418 U.S. 683, 703 (1974); *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979) (Powell, J., concurring).

II. *The Standing Of Individual Members of Congress To Sue the Executive Branch Is A Complex Question Not Presented In This case.*

Amici urge the Court not to analyze separately the standing of the individual legislators. In order to highlight the reasons why the Court should be reticent to use this case as a vehicle to explore the broader question of the standing of individual legislators, we will briefly discuss some of the other contexts in which legislators have turned to the courts to vindicate their constitutionally protected interests.

At the outset, it is useful to distinguish this case—where the respondents' asserted injury relates to their lawmaking function under Article I, § 7—from cases where the claim of harm relates either to a legislator's ability to participate fully in the legislative process or to preserve a legislator's role in an essentially Executive process, such as the confirmation of federal officials.

In the former category, courts have often recognized the right of legislators to bring suit to safeguard their prerogatives as members of Congress. Thus, for example, in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983), the court of appeals ruled that members of the House of Representatives had standing to bring suit against the House leadership challenging certain rules purportedly implemented to further entrench the majority party. And, in *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), the court held that a member of Congress had standing to intervene in a case brought by the Executive Branch to enjoin AT&T from complying with a subpoena issued by a House Subcommittee to assert the interests of the House of Representatives in preserving its investigatory powers. *See also American Federation of Government Employees v. Pierce*, 697 F.2d 303, 304-306 (D.C. Cir. 1982). *Cf. Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983); *Powell v. McCormack*, 395 U.S. 485 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966); *United States v. Ballin*, 144 U.S. 1 (1892).

As is clear, the questions relating to the standing of legislators to bring challenges of this sort are very different from those posed

here. In each of these cases, institutional interests of both individual legislators and Congress as an institution were at stake, but not necessarily susceptible to resolution through the normal course of political compromise. *Amici* urge the Court to avoid a ruling that closes the door to the courthouse once and for all to resolve disputes of this sort.

There are also a number of cases involving challenges by individual legislators alleging that they have been improperly excluded from participating in certain functions which are not law-making, but which are nonetheless expressly assigned to Congress under the Constitution. To begin with, there have been a number of cases in which Senators have brought suit to preserve their role under Art. II, § 2, of the Constitution in the approval of Treaties entered into by the United States. Thus, for example, in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (*en banc*), *vacated and remanded*, 444 U.S. 996 (1979), the court of appeals ruled that members of the Senate had standing to challenge the President's unilateral revocation of a Treaty with Taiwan, since the Senators had alleged that the President's action had denied them their right to vote on the Treaty revocation. While this Court's summary ruling does not fully explicate the Court's reasoning, Justice Powell's concurrence does make it clear that at least some members of the Court believe that, in certain situations, Senators could bring suit to challenge unilateral Executive action alleged to abrogate their right to vote on either Treaty ratification or revocation. *See also Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978)(assuming without deciding that legislators had standing to challenge use of Treaty power to convey property, including the Panama Canal, to the Republic of Panama in violation of Art. IV, § 3, cl. 2, which gives Congress the exclusive power to dispose of federal property).[2]

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[2] There have been a number of other cases brought by members of Congress challenging other aspects of the Executive's conduct of foreign affairs, including *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983)(*per curiam*); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1974); and *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977).

There have also been a number of cases in the appointments area, where members of the Senate have filed suit to safeguard their right under Art. II, § 2, cl. 2, to advise and consent to the appointment of senior federal officers. Thus, for instance, in *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1982), the court of appeals held that a member of the Senate had standing to challenge the composition of the Open Market Committee of the Federal Reserve System, based on the claim that certain members of the Committee were acting as Officers of the United States but had not been confirmed by the Senate. *Accord Melcher v. Federal Open Market Committee*, Civil Action No. 84-1335 (D.D.C., Order of June 5, 1986)(finding that Senator has standing to challenge composition of the Committee); *but see Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978)(challenge to composition of the Committee by Representative held non-justiciable) and *Committee for Monetary Reform v. Board of Governors*, 766 F.2d 538 (D.C. Cir. 1985)(private parties have no standing to challenge composition of Committee). Similarly, in *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C.), *stay denied*, 482 F.2d 669 (D.C. Cir. 1973), the court held that Senators had standing to challenge the appointment of an "acting" agency head as circumventing their right to participate in the confirmation of a senior federal officer. *See also Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1978)(three-judge court)(*per curiam*), *aff'd mem. sub nom. Pressler v. Blumenthal*, 434 U.S. 1028 (1978)(member of Congress had standing to sue to challenge automatic raise in congressional salaries under the Ascertainment Clause, Art I, § 6); *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984) (members of the Senate of the Virgin Islands had standing to sue to challenge the appointment of an Acting Commissioner of Commerce after the candidate had been rejected on confirmation vote by Senate).

And there has even been one case brought to preserve the House's primacy over revenue matters as set forth in the Origination Clause in Article I, § 2, cl. 1. In *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984),

members of the House were found to have standing to challenge the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982, on the ground that since the Act was not introduced initially in the House, it violated House members' rights to originate and debate all legislation relating to raising revenue prior to consideration by the Senate.

As is apparent, the standing issues raised in the Treaty, Appointments, and Origination Clause cases are quite distinct from those at issue here. Yet in none of these cases are the interests asserted "generalized grievances" shared by all Americans, as petitioners contend. Rather, they are institutional interests, established by the Constitution, and unique to one or both Houses of Congress. These interests are not self-executing, and in many cases, neither the House nor the Senate, let alone an individual congressman, has a ready sanction available in the event of non-compliance. While the process of political give-and-take has historically resolved many of the disputes that have arisen in these areas, there can be no doubt that, on occasion, impasse will be reached, and deadlock will set in. Indeed, in each of these cases, legislators were seeking protection from the courts only after a head-on confrontation occurred. Without the availability of judicial review, it is at least possible that these important constitutional checks will become nearly unenforceable, and that Executive or congressional action in derogation of these constitutional provisions will be essentially unreviewable. Thus, for example, following the logic of *Committee for Monetary Reform*, *Reuss*, and *Riegle*, it is doubtful that anyone other than a Senator could challenge the composition of the Federal Open Market Committee. To deprive members of the Senate of standing to bring such cases—as petitioners urge—would at least in many cases insulate alleged violations of the Appointments Clause from challenge. *Amici* urge the Court not to take such a drastic step in the course of deciding this case, but rather to reserve its consideration until these issues are properly presented for review.

In addition to the cases in which legislators seek to enforce rights explicitly conferred on them by the Constitution, there are

a number of cases in which members of Congress have brought suit to challenge the constitutionality of legislation. Obviously, in many of these suits, the legislator's standing is no different than that of other adversely affected members of the public, and *amici* do not urge that a different set of rules should apply. However, there are other cases in which the legislator's standing differs markedly from that of the public because the operation of the statute itself deprives the legislator of his official power. Recently, a three-judge court in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.)(*per curiam*), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986), upheld the standing of members of Congress to challenge the mandatory deficit reduction features of the Gramm-Rudman-Hollings Act. 626 F. Supp. 1381-83. In so ruling, the court found justiciable the lawmakers' claims that the mandatory budget reduction mechanism in the Act infringed upon their lawmaking powers under Art. I, § 7, to enact laws regarding federal spending. *Id.*

While this Court found it unnecessary to reach the question of the standing of individual legislators, there are two features about *Synar* worth noting. First, petitioners' standing argument might well have barred the congressional plaintiffs from maintaining that action. As noted, the principal standing theory asserted by the legislators was that the Gramm-Rudman Act would nullify their votes on future appropriation legislation.[3] But that is precisely the theory that petitioners contend is inadequate to support the standing of an individual member of Congress and that we urge the Court not to address in this case. Second, the jurisdictional statute at issue in *Synar* specifically authorized suits by members of Congress because Congress itself was uncertain of the constitutionality of its actions. In cases like *Synar*, it may be necessary in order to achieve consensus on the underlying legislation to include provisions that facilitate immediate and expeditious judicial review, thereby

[3] In addition to asserting standing on the basis of their legislative powers, the congressional plaintiffs in *Synar* alleged that the Gramm-Rudman Act would unconstitutionally result in the cutting of their salaries and the resources of their staffs.

eliminating any non-Article III or prudential bars to adjudication. Indeed, in *Synar*, not only was Congress concerned, but the President also gave more than tacit approval to the Act's special review provision by expressly noting in his signing statement that provision had been made in the Act that doubts about its constitutionality could be promptly resolved by the courts. 21 Weekly Comp. of Pres. Doc. 1499-1500 (December 16, 1985). Thus, especially where Congress and the President expressly contemplate judicial review in cases brought by members of Congress, this Court should not irrevocably close the courthouse door to such actions by adopting petitioners' broad non-justiciability theory.

CONCLUSION

As the foregoing discussion demonstrates, there are a number of widely varying contexts in which congressmen have turned to the Courts to enforce their official rights. This case—which focuses solely on the lawmaking function of Congress—is not an appropriate vehicle for undertaking a comprehensive review of the standing of legislators. Accordingly, *amici* urge the Court to put aside for another day the examination of the broad question of congressional standing.

Respectfully submitted,

David C. Vladeck
(*Counsel of Record*)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

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